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MICHAEL RODA

NO. 80-398

in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

PETER PIAMBINO, et al.,
Petitioners,

vs.

WILLIAM E. BAILEY, et al.
and DAVID SYLVA,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 10, 1980

QUESTIONS PRESENTED

Whether the court below erred in its finding that for private lawsuits the Securities Exchange Act does not constitute an "expressly authorized" exception to 28 U.S.C. ¶2283 and whether or not the court found that the 42 U.S.C. ¶1983 exception to 28 U.S.C. ¶2283 is not available for the protection of property rights.

LIST OF PARTIES

The following listed persons were parties in the procedings below:

NAME	INTEREST
Peter Piambino	Plaintiff
Joseph F. Kucklick	Plaintiff
Marilyn Koslen	Plaintiff
Robert M. Ernst	Plaintiff
Michael J. Gardner	Plaintiff
James D. Small	Plaintiff
All persons who purchased or invested in Director Distributorships during the period from March 7, 1980 through August 10, 1973	Members of the Plaintiff Class
Bestline Products, Inc.	Defendant
Bestline Corporation	Defendant
William E. Bailey	Defendant
David L. Eastis	Defendant
Jerry G. Brassfield	Defendant
Robert Depew	Defendant
Leo Diel	Defendant
Charles Simmons	Defendant
Larry D. Huff	Defendant
Larry S. Huff	Defendant
James Rohn	Defendant
Towru Ikeda	Defendant
Steve C. Stern	Defendant
James K. Hisler	Defendant
Ralph Flynn	Defendant
Martin Day	Defendant

Norman Miller	Defendant
Joseph Cotroneo	Defendant
Richard Dumont	Defendant
Saul Tave	Defendant
Richard Lub	Defendant
Jerry J. Weiss	Defendant
Davis Soto	Defendant
Keith Fox	Defendant
Oliver P. Colvin	Defendant
Tink Anderson	Defendant
Frank Brendis	Defendant
David T. Gibson	Defendant
Gordon Blaum	Defendant
Edna Blaum	Defendant
Richard Grillo	Defendant
Melvin Moran	Defendant
Richard G. Kruse	Defendant
Blair R. Egli	Defendant
Neal Morehart	Defendant
Peter Eiselstein	Defendant
Bert Hardcastle	Defendant
Alfred G. Moravec	Defendant
Kenneth Davis	Defendant
Norman Evans	Defendant
Carroll Gentry	Defendant
Robert E. Johnson	Defendant
Robert L. Shell	Defendant
C.D. St. Peter	Defendant
James Herbert	Defendant
Donald Omholt	Defendant
Sten Tallarida	Defendant
Willie Larkin	Defendant
Frank Conti	Defendant
Andi Dias	Defendant

Marvin Sternberg	Defendant
E. J. Beckman	Defendant
Kenneth Lutz	Defendant
Edward Buck	Defendant
John Wolfe	Defendant
Robert Schuster	Defendant
Robert Richards	Defendant
William Gelfound	Defendant
Lennart Osterman	Defendant
Jan B. Bailey	Defendant
Janin, Morgan & Brenner, a partnership	Defendant
Janin, Morgan & Brenner, a corporation	Defendant
Frank Interdonato	Defendant
George Wunch	Defendant
Robert Burke	Defendant
Wisconsin Attorney General's Office	
New Jersey Attorney General's Office	
Pensylvania Attorney General' Office	California Restitutionary Program
Missouri Attorney General's Office	
Texas Attorney General's Office	
California Attorney General's Office	
New York Department of Consumer Affairs	
David R. Sylva	Intervenor
Bank of America, N.T. & S.A.	Trustee, California Restitutionary Program

All persons eligible for distributions from the California Restitutionary Program	California Restitutionary Program
Securities & Exchange Commission	Amicus curiae

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B. The court made no finding as to whether the 42 U.S.C. ¶2283 is or is not available for the protection of property rights, and the opinion is not in conflict with the cases cited by Petitioner. 16

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PETER PIAMBINO, et al.,

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and DAVID SYLVA,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondent, David Sylva, Compliance Officer of the California Restitutionary Fund, respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 6, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, James Lawrence King, J., as to the securities issues is printed in Petitioner's Appendix D and is reported at 412 F.Supp. 732. The order of the same court as to the injunction and other appealed issues is printed in Respondent's Appendix II. The opinion of the United States Court of Appeals for the Fifth Circuit, which reversed the judgment and order of the District Court, is printed in Petitioner's Appendix E and is reported at 610 F.2d1306.

JURISDICTION

As stated by Petitioner, petitions for rehearing and rehearing en banc were denied on June 5, 1980, and the petition for certiorari was required to be filed on or before September 3, 1980. Rule 20(1). The petition for certiorari was not filed until September 12, 1980, and should be dismissed as untimely.

STATEMENT OF THE CASE

Petitioner's statement of the case fails to adequately present the complex and unique facts of this case. A comprehensive analysis of the facts appears in the Circuit Court opinion at 610 F.2d 1306, 1309-1330 (App. E-11-64), with a chronology of events at 610 F.2d 1334 (App. E-75).

Proceedings in two distinct forums were at issue in the Circuit Court appeal — the action in the California Superior Court initiated in 1971 by the California

Attorney General against Bestline Corporation, et al ("Bestline") for violation of California statutes prohibiting deceptive advertising and unfair competition committed in the State of California against California residents, and class action suits filed in 1973 against Bestline under Rule 23, F.R.Civ.P. for violation of the federal securities laws, which numerous actions were consolidated in 1974 in the Southern District of Florida.

After trial in the California action resulting in Final Judgment against Bestline on July 25, 1973, the State of California and Bestline negotiated a Modified Judgment filed December 21, 1973. Such Modified Judgment expanded the previously established California Restitutionary Fund (the "Fund") created as a result of the final judgment against Bestline, but restricted to California residents, to include the following:

> (1) Each individual who became a Direct Distributor or a Candidate Direct Distributor in California after January 14, 1971, to and including July 25, 1973, and who requests a refund;
>
> (2) Any individual who is entitled to restitution pursuant to agreement reached between any other state or political subdivision thereof or any federal department or agency and Bestline Products, Inc., and/or Bestline Corporation.
>
> (3) Any other individual who became a Candidate Direct Distributor or Direct

> Distributor in Bestline in any state other than those specified [above] who has satisfied any of the following conditions: (1) the company approves the claim; (2) the distributor has received an arbitration award pursuant to a national plan of arbitration, or (3) pursuant to judgment. (App. E-22).

Thus, the Fund became open to any direct distributor or candidate direct distributor, wherever resident, who had obtained a final judgment, whether through a government agency or privately, against Bestline.[1] The Modified Judgment was appealed on other grounds, but was affirmed. *People vs. Bestline Products, Inc.*, 61 Cal.App. 3rd 879, 132 Cal. Rptr. 767 (1976).

In addition to the Modified Judgment, the State of California and Bestline entered into Instructions to Compliance Officer and Trust Agreement, under which a compliance officer was appointed and authorized to administer the collection of the semi-annual restitutionary payments, to process claim forms from and disburse funds to participants around the country and to do whatever necessary to effectuate the purpose of the Fund. (App. E-45-46).

---

[1]At the time the Fund was destroyed by the preliminary injunction and final judgment entered in the District Court, the residents of Missouri, Ohio, Pennsylvania, New Jersey, Texas, Wisconsin and the City of New York were participating in the Fund as a result of judgments or settlements obtained by their public officials against Bestline.

An initial payment of $4,085,936.61 was transferred to the Fund and payment of $250,000 to $1,000,000 (or 50% of pre-tax profits) were required to be made by Bestline semi-annually, beginning January 1, 1976 (App. E-28).

As stated by the Circuit Court "Lead counsel (footnote omitted) for the consolidated actions made several attempts in California courts to disrupt the California restitution payments." 610 F.2d 1314, (App. E-24):

1. On September 20, 1974, lead counsel notified the Bank of America, the Fund trustee, that the plaintiff class claimed a prior equity in the Fund, and would sue the Bank of America if it disbursed the settlement proceeds;

2. On October 8, 1974, lead counsel threatened litigation to enjoin the Bank of America from its initial disbursement; following a hearing before the California Superior Court on these threats, which lead counsel attended, the Bank of America was ordered to disburse; lead counsel did not appeal.

3. Immediately thereafter, lead counsel filed a class action suit in the Northern District of California alleging that the disbursement by the Fund denied the Plaintiff class due process and equal protection and requested an injunction. Although a hearing on these claims was set for March 28, 1975, lead

counsel failed to appear and the action was dismissed with prejudice; on appeal, the Ninth Circuit Court dismissed the appeal without opinion. (App. E-24-25).

The Modified Judgment, having been attacked by lead counsel in both state and federal courts and having survived all attacks, became "absolutely final and entitled to full faith and credit." 610 F.2d 1315 (App. E-26).

Failing to disrupt the Fund, lead counsel pursued the Florida class action. On June 18, 1976, in anticipation of the semi-annual payment of $500,000 due from Bestline to the Fund on June 30, 1976, Petitioners sought a temporary injunction restraining Bestline from making such payment and complying with the Modified Judgment. (Resp. App. I).

The basis of this extraordinary request was twofold: one, that 42 U.S.C. ¶1981 et seq., as an "expressly authorized" exception to the Anti-Injunction Act, authorized the injunction since the Fund denied due process and equal protection to the Petitioner class; and two, "to preserve effective federal jurisdiction over the claim under the Exchange Act, the federal court must act to preserve the fund. Such action is 'necessary in aid of its jurisdiction.' " (App. I-9). Petitioner made no claim whatsoever that the Securities Exchange Act constituted an "expressly authorized" exception to the Anti-Injunction Act.

At this point, Bestline was a functioning corporation which had made the required January 1,

1976 payment of $250,000 to the Fund and which operated manufacturing facilities in both California and Illinois. No receivership had been imposed on the corporation, no voluntary or involuntary bankruptcy was in effect and Bestline had notified the Compliance Officer of its intent and ability to make the $500,000 payment due June 30, 1976.

At a hearing held June 30, 1976, twelve days after the filing of the motion for temporary restraining order, the District Court ordered Bestline to violate the Modified Judgment and to deliver the $500,000 to the registry of the Southern District of Florida.

The Preliminary Injunction contained no finding that the California Modified Judgment or the Fund was illegal, improper, a violation of due process or equal protection or a fraud or conspiracy to defraud the petitioner class or to violate the Securities laws. The sole and exclusive basis for the Preliminary Injunction was baldly stated by the District Court: "Accordingly, this Court concludes that it would be inequitable . . ." to permit compliance with the Modified Judgment and given "Bestline's comparatively weak financial condition, the [District] Court concludes that the sum of $500,000 presently held by Bestline should be transferred to the Registry of this Court to protect the integrity thereof for the plaintiff class." (App. B-7).

The Preliminary Injunction does not mention, let alone deal with, the prohibitions of the Anti-Injunction Statute, 28 U.S.C. ¶2833, although the prohibition of this statute was raised both in oral argument and in briefs. At this point, Bestline appealed the Preliminary

Injunction and the security issue summary judgment and an opening brief was filed.

On January 28, 1977, Petitioner and Bestline filed a notice of settlement, announcing their agreement to settle the entire action for:

1. $900,000 from all defendants;

2. a $300,000 Bestline note, guaranteed by the president of the corporation;

3. liquidation of Bestline's assets (on which approximately $230,000 was realized despite representations of $600,000 in value) (App. D-14);

4. waiver of Bestline's claim to the $500,000 seized by the District Court pursuant to the preliminary injunction and;

5. payment of attorney's fees of $750,000 and court costs of $50,000.

On February 14, 1977, David Sylva, Compliance Officer of the Fund, filed a petition to intervene on behalf of the members of the Fund, as a sub-class, to protect their rights to the $500,000 and to object to the settlement.

By order dated March 22, 1977, the District Court denied the petition to intervene and approved the settlement. Although Intervenor David Sylva filed a motion to stay disbursement, the $750,000 attorney's

fees were paid to lead counsel even prior to Intervenors receipt of the order denying his motion to intervene.

Following this denial, Intervenor/Respondent Sylva appealed on four grounds:

1. denial of the petition to intervene

2. entry of a permanent injunction seizing the $500,000

3. approval of the settlement agreement

4. approval of $750,000 attorney's fees.

Upon Intervenor's appeal, Bestline declined to dismiss its appeal of the security issues summary judgment and indicated that should the District Court order be reversed, that it would pursue its appeal. Following oral argument, supplemental briefs were requested as to the securities issues.

The Circuit Court, in a lengthy and thorough review of the entire proceedings, reversed on each and every point appealed by Intervenor, holding:

> "1. Summary judgment should not have been entered.
>
> 2. Sylva was entitled to intervention as a matter of right.

3. The attorneys' fees as proposed in the Bestline settlement should not have been approved as presented.

4. The entry of an injunction against enforcement of the judgment of the California Superior Court is reversed.

5. The order entering final judgment as to Bestline and 27 individual defendants is vacated" (App. E-74).

Petitioner has appealed only holdings 1 and 4. Although Petitioner previously argued that the injunction was both an "expressly authorized" exception and "necessary in aid of its jurisdiction" so as to avoid the Anti-Injunction statute, Petitioner alleges conflict solely with the denial of an "expressly authorized" exception.

Since Intervenor/Respondent Sylva neither raised nor argued the securities issue summary judgment, this Brief in opposition will deal exclusively with the Circuit Court reversal of the injunction.

ARGUMENT

1. The Decision Below Is Not In Conflict With The Decisions of Other Courts of Appeals and of the Supreme Court as to the "Expressly Authorized" Exception to the Anti-Injunction Statute.

Since the District Court opinion failed to state any basis other than equity for its injunction, the Circuit

Court undertook to raise, thoroughly review and ultimately reject every possible "unexpressed rationale for [the] decision." App. E-68. The Circuit Court opinion is completely in line with recent United States Supreme Court and Court of Appeals decisions, and Petitioner, failing to find conflict with any Court of Appeals decision, has relied almost exclusively on alleged conflict with prior opinions of the Fifth Circuit.

A. The court's finding that for private lawsuits the Securities Exchange Act does not constitute an "expressly authorized" exception to 28 U.S.C. ¶2283 is not in conflict with the cases cited by Petitioner.

Petitioner alleges that the Security Exchange Act is, in toto, an "expressly authorized" exception to ¶2283, but cites no cases whatsoever so holding.[2]

In *Machesky vs. Bizzell,* 414 F.2d 283 (5th Circuit 1969)[3] the Fifth Circuit held that the principles of comity embodied in ¶2283 "give way in those extraordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights." *Supra* at 287 (emphasis supplied). In *Tampa Phosphate R. Co. vs Seaboard Coastline R. Co,* 418 F.2d 387, (5th

[2]Petitioner has cited five decisions as the basis for the alleged conflict jurisdictions of this Court: *Machesky v. Bizzell,* 414 F.2d 283 (5th Circuit 1969), *Tampa Phosphate R. Co. v. Seaboard Coastline R. Co.,* 418 F.2d 387 (5th Circuit 1969), *SEC v. Wencke,* 577 F.2d 619 (9th Cir. 1978), *Joiner v. City of Dallas, Texas,* 488 F.2d 519 (5th Cir. 1974) and *Lynch v. Household Finance Corp.,* 405 U.S. 538 31 L. No. d.2d 424, 92, S.Ct. 1113 (1972).

[3]In *Machesky, supra,* plaintiff civil rights groups sought a federal injunction against a state court order prohibiting picketing and other exercise of purely first amendment rights.

Circuit 1969),[4] the Fifth Circuit held that Section 1 (20) of the Interstate Commerce Act, 49 U.S.C.A. ¶1 (20), by authorizing suit by the Interstate Commerce Commission or "any party in interest," constituted an "expressly authorized" exception to ¶2283 for injunctions against violations of the Act. Neither of these cases makes any finding as to a Securities Exchange Act exception to ¶2283 nor adopts any general principles concerning exceptions to ¶2283.

Plaintiff appears to cite these two decisions solely in order to rely on their purely *dicta* discussions of *Studebaker vs. Gittlin,* 360 F.2d 692 (2d Circuit 1966).[5] In the 1966 *Gittlin* decision, the Second Circuit found that since the Security Exchange Commission would not be prohibited by ¶2283 from obtaining injunctive relief against a state action determined on the merits to constitute a proxy violation, a private party should similarly be entitled. *Supra* at 698. The decision has been narrowly interpreted, *GAF Corporation vs. Milstein,* 453 F.2d 709 (2d Circuit 1971); *Vernitron Corp., vs Benjamin,* 440 F.2d 105, 108 (2d Circuit 1971); *Jennings vs. Boenning & Co.,* 482 F.2d 1128, (3rd Circuit

[4]In *Tampa, supra* plaintiff railroad sought a federal injunction against defendant railroad's state court condemnation proceedings on grounds that defendant had failed to obtain a certificate authorizing construction as required by the Interstate Commerce Act.

[5]This decision is not cited as a basis of conflict jurisdiction. In *Studebaker,* plaintiff corporation sought a federal injunction against a stockholder's use in State Court of authorizations to seek a stockholder list which were obtained clearly in violation of Section 14(a) of the Security Exchange Act.

1973),[6] and extension of its rationale was specifically rejected by the Second Circuit in *International Control Corp. vs. Vesco,* 490 F.2d 1334 (2d Circuit 1974), when it refused to authorize a private lawsuit injunction for only alleged violations of the securities laws and restricted its decision in *Gittlin, supra* at 1349. The refusal to extend *Gittlin* to alleged securities violation was adopted as "eminently correct" by the opinion below. 610 F.2d 1332 (App. E-70-71).

Thus, Petitioners have placed themselves in the ridiculous position of urging that an extension of the *dicta* in *Machesky* and *Tampa,* relying solely on *Gittlin,* is in conflict with the opinion below which adopts *International Controls Corp.,* wherein the Second Circuit refuses to extend its opinion in *Gittlin.* Obviously, this is why Petitioner failed to cite *Gittlin* as a basis for conflict jurisdiction, since the alleged conflict was resolved by the Fifth Circuit approval of the Second Circuit decision in *International Controls Corp.* Indeed,

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[6]In *Jennings vs. Boenning & Co., supra,* Defendant had obtained a final state court judgment against plaintiff in a civil suit. Plaintiff filed suit in federal court alleging violation by defendant of the Securities Exchange Act and the federal court granted a preliminary injunction against execution by defendant on the state court judgment.

In reversing, the Third Circuit held that *Studebaker supra,* permitted injunctions of the state court action only if that action itself was a violation of proxy rules. "The continuation of a proceeding concerned solely with [the prior business relationship] did not constitute a furtherance of an ongoing violation of the Security Exchange Act so as to necessitate operation of ¶21(e) [injunctive relief]." *Supra,* page 1131. The facts at issue are similar.

if the Fifth Circuit had adopted the position urged by Petitioner, it would have been truly in direct conflict with the Second Circuit in *International Controls Corp.*

This discussion is purely theoretical, since even the rationale of *Gittlin* would not have justified the injunction issued herein, since there was never a decision on the merits that a securities violation occurred. In fact, Petitioner's motion for preliminary injunction made no securities violation claim whatsoever and argued only some vague theory that unless the federal court could guarantee a fund of money to plaintiffs in a private action under the Securities Exchange Act, the District Court's jurisdiction over federal securities law was somehow undermined. (App. I-9-10). The "expressly authorized" exception was raised and rejected only by the Circuit Court, in an attempt to find some rationale for the District Court's preliminary injunction and was never argued by Petitioner.

Petitioners appear to cite *SEC vs. Wencke,* 577 F.2d 619 (9th Cir. 1978), in the same vague "fraud-deception-equity" syndrome that doomed them in the District Court. In *Wencke, supra,* the Securities Exchange Commission, as a government agency specifically enforcing the Securities Exchange Act in connection with an ongoing fraud action, requested an injunction of a pending state court action. The holding of the Ninth Circuit in granting the preliminary injunction is specific: "Title 28 U.S.C. ¶2283 . . . does not apply to injunctions issued at the request of the United States. *Leiter Minerals, Inc. vs. United States,* 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed. 2d 267 (1957)." *Supra* at 623. Indeed,

the Ninth Circuit excludes private litigants from the exception: "the purpose of ¶2283 was to avoid unseemly conflicts . . . where the litigants were private persons, not to hamstring the Federal Government . . . ," *Supra* at 623.

Rather than being in conflict with the cases cited, the opinion below is part of the natural internal development of the law in the Fifth Circuit, and is consistent with the more recent opinions of the Supreme Court and other circuits. *Vendo Co. vs. Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 281, 53 L.Ed.2d 1009 (1977); *International Controls Corporation, supra.* Development of internal Circuit Court opinions are not the type of direct conflicts justifying certiorari review. Stern and Grossman, *Supreme Court Practice,* ¶4.6 (5th Ed. 1978.); Rule 17, Sup.Ct.R.

Further, even if the principle of law urged by Petitioners was adopted there would have been no difference in the result achieved below. The Petitioners would have still been required to make some semblance of a claim under the Securities Exchange Act; yet is clear that the motion for preliminary injunction made no such claim against Bestline and/or the Modified Judgment and/or the State of California. (App. I). In fact, the sole "expressly authorized" claim was that the Modified Judgment constituted a denial of due process and equal protection, both of which claims were rejected in state and federal courts in California and in the opinion below. The only reference to the Securities Exchange Act in the motion for preliminary injunction was as to the "in aid of its jurisdiction" exception to the

Anti-Injunction Act, which ground was rejected by the Circuit Court and has specifically not been asserted herein by the Petitioner.

B. The court made no finding as to whether the 42 U.S.C. ¶1983 exception to 28 U.S.C. ¶2283 is or is not available for the protection of property rights, and the opinion is not in conflict with the cases cited by Petitioner.

The opinion below makes no findings as to whether or not the 42 U.S.C. ¶1983 exception to the Anti-Injunction Act protects property rights. The opinion deals only with Petitioner's claim that the Modified Judgment violated Petitioner's due process and equal protection rights and dismisses these claims as "frivolous" (App. E-69-70).

The basic claim in Petitioners' motion for preliminary injunction was that the Modified Judgment violated their constitutional rights to due process and equal protection by excluding them "arbitrarily and unreasonably" from participation in the Fund due to their residence or because they failed to receive notice of the state court action. Petitioners argued that since such violations would be violations of ¶1983 and since ¶1983 was a recognized exception to the Anti-Injunction Act, the preliminary injunction was justified.

The Circuit Court explicitly recognized the ¶1983 exception to the Anti-Injunction Act, per *Mitchum vs. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d. 705 (1972), and simply opined that: "Section 1983 speaks in

terms of 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' and if it were construed to mean *all* federal laws then the exception would quickly swallow the rule set forth in ¶2283." 610 F.2d. 1332 (App. E-69). By no stretch of the immagination can this be deemed a holding that the ¶1983 exception to ¶2283 does nor does not protect property rights.

As to Petitioner's citation of *Lynch, supra* and *Joiner, supra*, the decisions are wildly inapplicable. In *Joiner*, the Supreme Court endorsed a federal court injunction against a state pre-judicial garnishment procedure on the specific grounds that the garnishment did not involve a state court proceeding. It explicitly avoided any holding as to the ¶1983 exception to the Anti-Injunction Act:

> "Because of the extrajudicial nature of Connecticut garnishment an injunction against its maintenance is not therefore barred by the terms of ¶2283. In light of this conclusion, we need not decide whether ¶1983 is an exception to ¶2283 "expressly authorized by Act of Congress." We have explicitly left that question open in other decisions. And we may put it to one side in this case because the state act that the federal court was asked to enjoin was not a proceeding "in a State court" within the meaning of ¶2283." *Supra* at 437.

In *Lynch*, the Fifth Circuit merely remanded the case to the district court for proceedings consistent with the *Joiner* decision, and made no independent holdings at all. 488 F.2d. at 520-521.

It is clear from a review of the Circuit Court decision (App. E-69-70) that the Court rejected petitioner's claims on the facts presented — finding no requirement that the Attorney General of the State of California notified Petitioner class of a state court action initiated before the filing of this class action lawsuit, and that the establishment by the California Attorney General of a restitutionary fund for the benefit of California residents damaged by a violation of California law did not constitute denial of equal protection. Essentially, the court found that petitioners had no right to participation in the Fund and no property rights in the Fund which warranted protection, not that Petitioners had property rights which ¶2283 prevented them from protecting.

The Circuit Court opinion, based upon the over 1,000 page Record on Appeal, the briefs and supplemental briefs submitted by all parties, and the exhaustive review and analysis of the record, has issued a cogent, correct analysis of the current interpretation of the "expressly authorized" exception to the Anti-Injunction Act. The opinion given was logical and consistent with current law and should be affirmed.

CONCLUSIONS

For these reasons, no writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit/

RESPECTFULLY SUBMITTED,
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David Sylva

October 10, 1980

Appendix

APPENDIX I

[FILED JUN 21]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MDL DOCKET 162-Civ-JLK

IN RE: BESTLINE PRODUCTS
SECURITIES AND ANTITRUST
LITIGATION

PLAINTIFFS' FIRST MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs move for a Temporary Restraining Order staying Defendants, Bestline Products, Inc. and Bestline Corporation, their agents, employees, attorneys, representatives, affiliates and/or other persons acting in concert therewith, pending determination of Plaintiffs' First Motion for Appointment of Receiver, from transferring any funds or other things of value to Bank of America, the California Attorney General, or to any other person, firm or corporation, except in the ordinary course of business for funds or tangible value received.

In support of this Motion, Plaintiffs would show that:

1. On or about December 21, 1973, Bestline entered into an "Agreement, Instructions to Compliance Officer and Trust" with the California Attorney General which was incorporated into the "Modified Judgment" entered on December 21, 1973, by the California Superior Court for Los Angeles County.[1] The aforesaid "Agreement, Instructions to Compliance Officer and Trust" provides for restitutionary payments from the entrusted funds to (a) Bestine Distributors in the State of California who became such after January 14, 1971, (b) Bestline Distributors within and without the State of California who are entitled to restitution pursuant to any agreements reached between any other state or political subdivison thereof or any Federal department or agency and Bestline and (c) any other distributor (i) as to whom Bestline approves their claim or (ii) who has received an arbitration award pursuant to a national plan of arbitration, or (iii) pursuant to judgment.

2. Under the terms of said "Agreement, Instructions to Compliance Officer and Trust" there was established a trust wherein Bestine agreed to transfer certain funds to the Bank of America. Pursuant thereto, Bestline is scheduled on or about June 30, 1976, to transfer to Bank of America for distribution shortly thereafter to participants in the California Restitutionary Plan, the sum of $500,000.00, or 50% of the pretax profits of Bestline, whichever is greater.[2]

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[1]See Amicus Memorandum Re Appointment of Receiver filed herein by the California Attorney General on April 5, 1976, Exhibits "1" and "2".

[2]See Amicus Memorandum, Exhibit "13."

3. At the present time, there are some 7,043 persons participating in the California Restitutionary Plan, all of whom are entitled to a substantially equal share of the funds paid into that plan by Bestline.[3] Accordingly, on June 30, 1976, the $500,000.00 to be paid by Bestline to the Bank of America will be disbursed by the Bank in the form of 7,043 checks in the amount of approximately $71.00 each.

4. It will be virtually impossible to recoup the funds paid over for distribution on June 30, 1976, once said funds have been divided into small payments and disbursed to the participants in the California Restitutionary Plan. Thus, immediate and irreparable injury will result to the Plaintiff Class before this Court has had an opportunity to rule on the merits of Plaintiffs' First Motion for Appointment of Receiver.

5. The terms of said Modified Judgment, including the "Agreement, Instructions to Compliance Officer and Trust," accord to Bestline complete, unilateral and unreviewable power and authority to designate, on a continuing basis, the beneficiaries of the trust, and the attendant right of such persons to receive restitutionary payments disbursed by the Bank of America from the funds entrusted to it, as a consequence of which Bestline maintains constructive possession of the funds designated for contribution to the trust.

6. The consideration tendered to Bestline by the Plaintiff Class for the purchase of Bestline Direct

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[3]See Amicus Memorandum, p. 4.

Distributorship Contracts or Agreements is directly traceable to the funds presently held by Bestline. Therefore, it is inequitable for the California Plan participants to receive said funds to the exclusion of the Plaintiff Class.

7. By virtue of the foregoing, the funds distributed and scheduled for distribution in the future to the California Plan participants are subject to a constructive trust, and all members of the Plaintiff Class are entitled to share ratably in any distribution thereof in accordance with their contribution thereto.

8. Plaintiffs incorporate herein by reference the allegations and references to the record contained in Plaintiffs' First Motion for Appointment of Receiver.

9. The issuance of a temporary restraining order staying the further transfer of funds will not cause any damage, loss or inconvenience to Defendants but will prevent continued and further irreparable injury to the Plaintiff Class.

MEMORANDUM OF LAW

As defined by Professor Moore, a restraining order is:

> . . . a temporary order entered in an action, without notice, if necessary, and upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and dermination of the rights of the parties or the Court's jurisdiction

upon motion for a preliminary injunction. See 7 *Moore's Federal Practice,* ¶65.05

Here, a restraining order is sought pending a determination of Plaintiff's First Motion for Appointment of Receiver. However, this does not affect the basic guidelines for issuance of a temporary restraining order.

It is well established that the application for a restraining order, like a motion for interlocutory injunction, is addressed to the sound discretion of the Court. See *United States v. Corrick,* 298 U.S. 435, 56 S.Ct. 829, 80 L.Ed. 1263 (1963), *7 Moore's Federal Practice,* ¶65.05, p. 65-75.

It is submitted that the elements to be considered as a predicate for issuance of a temporary restraining order herein are: (1) A showing of irreparable harm to the Plaintiff Class in absence of such relief; (2) the likelihood of possible harm to other interested parties as a result of the issuance of a temporary restraining order; and (3) the likelihood of Plaintiffs' success on the merits. See *Murphy v. Society of Real Estate Appraisers.* 388 F.Supp. 1046 (E.D.Wisc.1975). Here it is clear that irreparable harm will result to the Plaintiff Class if the $500,000.00 presently scheduled for disbursement is in fact distributed among the 7,000 California Plan participants. It will be virtually impossible for Plaintiffs to ever recoup the funds once they are so disbursed.

The likelihood of possible harm to other parties because of issuance of the temporary restraining order is

virtually nonexistent. In the first instance, it is noted that the payments to the California Plan participants have on prior occasions frequently been delayed without any resultant harm to participants. Secondly, it must be assumed that the funds, so long as they are retained by Bestline, will be maintained in interest bearing form so that the total amount of funds available to the California Plan participants will be increasing at a rate of interest which is at least equal to that which the participants could expect to receive if the funds were deposited in $71.00 increments.

In essence, Plaintiffs have already prevailed on the merits, there remaining only the determination of the extent of damages to the Plaintiff Class. Accordingly, the only issue for consideration here is the relative merits of the claims of the Plaintiff Class as opposed to the claims of the California Plan participants. This, however, is not the issue at this stage of the proceedings. Plaintiffs recognize that at a later time Bestline may contend that this Court is effectively overruling the California Superior Court's Modified Judgment. However, the only basis for such objection would seem to be found in the "anti-injunction" statute, 28 U.S.C., §2283. However, 28 U.S.C., §2283, does not preclude an injunction to prevent state authorities from violating Federal Constitutional rights. Section 2283 permits intervention by this Court in the present case because such intervention is expressly authorized by statute and is necessary in aid of the Federal Court's jurisdiction.

It is submitted that the California Modified Judgment violates the 1871 Civil Rights Act, 42 U.S.C. §1981 et seq. In this context, it is noted that in Mitchum

v. Foster, 407 U.S. 225 (1971), the Supreme Court held that 42 U.S.C. §1983, "expressly authorized" federal injunctions against state court proceedings. Therefore, a federal court is not forbidden by Section 2283 from enjoining a state court where the Civil Rights Act was violated. That Act provides for federal redress whenever anyone, acting under color of state law, deprives another of any federally-based right. In the present case, it appears that the California Modified Judgment violates several such federal rights:

1. The Plaintiff Class never received notice of the California proceedings even though they are guaranteed such notice by due process of law. U.S. CONST. amend. XIV; Mullane v. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

2. The Plaintiff Class was denied the right to participate in the fund on the ground that they are non-Californians. This violates the Privileges and Immunities Clause of the Constitution. U.S. CONST. art. IV, §2, clause 2; U.S. CONST. amend XIV, §1.

3. The California Modified Judgment discriminates against non-Californians solely on the basis of their place of residence, thus denying them equal protection of the laws. U.S. CONST. amend. XIV.

4. The California Modified Judgment effectively eliminates Plaintiffs' claims to the equity of the fund based on Federal Securities Laws. This was accomplished by refusing to hear concurrent Federal claims, by notification of the claimants, requesting presentation of the claims, or by ordering disbursement before the Federal Court having exclusive jurisdiction is able to determine the question.

5. By allowing a non-judge, namely Bestline, to decide the Plaintiffs' claims under the Securities Acts, the California Modified Judgment violates the Securities Act prohibition against arbitration. Wilko v. Swan, 346 U.S. 427, 437 (1953). Cf. A & E Plastic Pak Co. v. Monsanto, 396 F.2d 710, 715-716 (9th Cir. 1968).

6. By allowing Bestline, a party to the litigation, to decide the case of non-Californians, the non-Californians were also deprived of a fair trial under the provisions of the California Modified Judgment. In Gibson v. Berryhill, 411 U.S. 564 (1973), the Court sustained objections to a tribunal for bias. Clearly, it is hard to imagine a person more biased than one who is a party to the litigation. See also Commonwealth Coating Corp. v. Continental Casualty Co., 393 U.S. 145 (1968); Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 557 (1972). Accordingly, it is clear that

> Plaintiffs' federally secured rights were deprived by the California Modified Judgment under "color" of state law. See 42 U.S.C., §1983. Accordingly, under Mitchum v. Foster, supra, the federal courts are expressly authorized to pre-empt state court proceedings.

In addition to the foregoing considerations which clearly show that federal intervention is authorized by the Civil Rights Act, it would also appear that such intervention would be permissible under 28 U.S.C. §2283, wherein it is provided that federal injunctions are permitted when "necessary in aid of [the federal court's] jurisdiction."

In the case at bar, the California Superior Court has effectively seized a major part of Bestline's assets to enforce its judgment. Plaintiffs herein in a simultaneous federal proceeding are asserting that federal law confers upon them an interest in the funds which were pre-empted by the California Superior Court.

To the extent that the federal claims of interest in the fund are grounded in Rule 10b-5 and the Securities Exchange Act, only a federal court has jurisdiction to adjudicate the claim. Even if it wished to do so, the California Superior Court could not hear and determine an Exchange Act claim. To preserve effective federal jurisdiction over the claim under the Exchange Act, the federal court must act to preserve the fund. Such action is "necessary in aid of its jurisdiction." In short, the question is not whether the federal court should act but rather, whether a federal court can fail to enjoin the

state proceeding which has effectively pre-empted its jurisdiction.

In view of the foregoing considerations, it is submitted that the exceptions of 28 U.S.C. §2283, relating to both injunctions expressly authorized by statute, and in aid of jurisdiction, clearly permits federal intervention in the fund established by the California Superior Court.

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By /s/ Carl H. Hoffman

I HEREBY CERTIFY that a true copy of the foregoing was mailed or delivered to each Attorney of Record this 18 day of June, 1976.

/s/ Carl H. Hoffman
CARL H. HOFFMAN

APPENDIX II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MDL No. 162-Civ-JLK

IN RE BESTLINE PRODUCTS
SECURITIES AND ANTITRUST
LITIGATION

ORDER ENTERING FINAL JUDGMENT AS TO DEFENDANTS, BESTLINE PRODUCTS, INC., BESTINE CORPORATION, JERRY G. BRASSFIELD, CHARLES SIMMONS, JAMES ROHN, JAMES K. HISLER, RALPH FLYNN, MARTIN DAY, NORMAN MILLER, JOSEPH COTRONEO, RICHARD DUMONT, DAVID SOTO, OLIVER P. COLVIN, GORDON BLAUM, EDNA BLAUM, ALFRED G. MORAVEC, NORMAN EVANS, JAMES HERBERT, WILLIE LARKIN, MARVIN STERNBERG, KENNETH LUTZ, EDWIN BUCK, JOHN WOLFE, GEORGE WUNCH, DAVID GIBSON, ROBERT E. JOHNSON, ROBERT L. SHELL, FRANK BRENDES AND KENNETH DAVIS

This matter came before the court on the application of the class plaintiffs and the subscribers to the second stipulation of settlement pursuant to

F.R.Civ.P. 23 for the entry of final judgment approving the compromise and settlement of the above-captioned class action in accordance with the second stipulation of settlement and joint subscription of Bestline Products, Inc., et al, thereto.

On January 28, 1977, the court preliminarily approved the second stipulation of settlement and joint subscription of Bestline Products, Inc., et al, and ordered notice given to the class of the terms of the proposed settlement and the date of the March 11, 1977 hearing, held for the purpose of determining whether the proposed compromise and settlement was fair, reasonable and adequate. At the settlement hearing on March 11, 1977, the parties appeared by counsel, and this court having read and considered the second stipulation of settlement and joint subscription of Bestline Products, Inc., et al, thereto, the exhibits thereto, the briefs and affidavits and related papers filed, statements and arguments made by the respective parties in support of the settlement, and all other papers filed and proceedings heretofore had herein, finds that (1) the settlement was arrived at through arms-length good-faith bargaining among the parties, (2) the terms of the proposed settlement are fair, reasonable and adequate, and (3) the paragraph 4 of this court's order of January 28, 1977 with respect to notice to class has been complied with, and that said notice was the best notice practicable under the circumstances and constituted valid, due and sufficient notice to all persons entitled thereto for all purposes.

The court further finds that no member of the class objected to the terms of the proposed settlement or the amount requested as an attorney's fee for lead counsel.

The only objection made at the hearing was by the California compliance officer, who although not a party to this litigation had petitioned the court to intervene and who interposed an objection to the composition of the Class. Reserving ruling on the petition to intervene, the court heard from the California compliance officer. The compliance officer presented evidence at the March 11 hearing and requested that an exception be made for the members of the California restitution plan and that these people be allowed to belatedly opt-in the class. The court finds that the petition to intervene is both untimely and without merit.

This court is not being asked to set reasonable attorney's fees in conjunction with the instant settlement; rather the court is being presented with a proposed settlement, *agreed to by all parties and unopposed by the class,* which incorporates an award of attorney's fees in the amount of $750,000 as a vital part of the settlement. Certainly, different procedures and considerations might obtain were the court being requested to initially fix an attorney's fee. Since the award and amount of attorney's fees comes before the court in the posture of an unopposed settlement, the court finds that the amount is reasonable under the circumstances of this protracted and complicated case. It is therefore,

ORDERED and ADJUDGED that:

1. The settlement of the above-captioned class action as against the defendants, Bestline Products, Inc., Bestline Corporation, Jerry G. Brassfield, Charles Simmons, James Rohn, James K. Hisler, Ralph Flynn,

Martin Day, Norman Miller, Joseph Cotroneo, Richard Dumont, David Sost, Oliver P. Colvin, Gordon Blaum, Edna Blaum, Alfred G. Moravec, Norman Evans, James Herbert, Willie Larkin, Marvin Sternberg, Kenneth Lutz, Edwin Buck, John Wolfe, George Wunch, David Gibson, Robert E. Johnson, Robert L. Shell, Frank Brendis, and Kenneth Davis (hereinafter referred to as the "Subscribing Defendants"), is fair, reasonable and adequate, and that the same shall be, and it hereby is, finally approved, and the class plaintiffs and the subscribing defendants are hereby directed to consummate the settlement of the above-captioned class action in accordance with the terms and provisions of the second stipulation of settlement and the joint subscription of Bestline Products, Inc., et al, thereto.

2. The clerk of the court shall maintain all sums paid in accordance with the second stipulation of settlement and joint subscription of Bestline Products, Inc., et al, thereto in settlement of the above-captioned class action in a separate account and shall not co-mingle said funds with any funds received in settlement of this action against any other defendant(s).

3. The above-captioned class action and the fourth amended complaint (hereinafter "the complaint"), and all claims which have been asserted in them as against the subscribing defendants are dismissed on the merits and with prejudice as to all plaintiffs and all class members and in favor of the subscribing defendants without cost to any party or against another.

4. All persons named as plaintiffs in the complaint and all class members (other than those who have requested exclusion) shall be, and they are hereby, barred forever from prosecution of the above-captioned class action and any claims which have been asserted in the above-captioned actions against the subscribing defendants and any and all claims and causes of action against the subscribing defendants which have been or could have been asserted by reason of, or with respect to, or in connection with, or which arise out of, or which relate to, any of the matters set forth or referred to in the complaint.

5. The subscribing defendants, and each of their heirs, administrators, executors, successors and assigns, or legal representatives pursuant to any federal or state statute, are released from all claims or all class members (other than those who have requested exclusion) which have been asserted in the above-captioned class action and any and all claims and causes of action which have been or could have been asserted by reason of, or with respect to, or in connection with, or which arise out of, or which relate to any of the matters set forth or referred to in the complaints on file herein.

6. Class members who have timely requested exclusion from the class in accordance with this court's prior orders may hereafter pursue only their own individual remedies, if any.

7. The clerk of this court is hereby directed to pay out of the funds paid by the subscribing defendants and held by him, to lead counsel, James H. Joseph and Carl H. Hoffman, Esquires, the sum of $750,000 as further fee

in connection with the prosecution of the class action, which fee has been agreed to by all parties to this action as fair and reasonable. Lead counsel may apply for reimbursement or advance of such additional costs and expense as they may incur in connection with the administration of the second stipulation of settlement and the further prosecution of the consolidated actions.

8. This court reserves jurisdiction over the consolidated actions for the consummation of the settlement, including jurisdiction to entertain applications arising out of or connection with the second stipulation of settlement and joint subscription of Bestline Products, Inc., et al, thereto, and the interpretation, implementation or consummation of the terms and provisions of the second stipulation of settlement and the joint subscription of Bestline Products, Inc., et al, thereto, but this reservation of jurisdiction shall not delay the entry of this judgment.

9. Lead counsel shall be, and they hereby are, continued as trustees as to the real and personal property of the defendant, Bestline Products, Inc., entrusted to them pursuant to the second stipulation of settlement and the joint subscription of Bestline Products, Inc., et al, thereto. Said trustees shall, six (6) months after the date of this order, proceed to liquidate said property in a commercially reasonable manner, and shall cause the proceeds from the sale thereof to be paid to the clerk of this court to be added to the funds heretofore paid by the subscribing defendants.

10. The clerk of this court is directed to enter this final judgment including dismissal of the complaints in

the above-captioned actions against the subscribing defendants, on the merits and with prejudice, in accordance herewith, without cost to any party, upon receipt of the sum of $300,000 plus interest to be paid by the defendant, Bestline Products, Inc., or failing same, by the defendant, Jerry G. Brassfield.

DONE and ORDERED in chambers at Miami, Florida, this 22nd day of March, 1977.

/s/ JAMES LAWRENCE KING

UNITED STATES
DISTRICT JUDGE

cc: All Counsel